2022 IL App (4th) 220186

NO. 4-22-0186

FILED
November 23, 2022
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE VILLAGE OF ORION,	)	Appeal from the
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Henry County
PATRICIA A. HARDI and MICHAEL LARSON,	)	No. 17MR152.
Defendants-Appellees.	)	
	)	Honorable
	)	Dana R. McReynolds,
	)	Judge Presiding.

JUSTICE ZENOFF delivered the judgment of the court, with opinion.
Justices Steigmann and Doherty concurred in the judgment and opinion.

OPINION

¶ 1 In 2017, plaintiff, the Village of Orion (Village), sued defendants, Patricia A. Hardi and Michael Larson, to enjoin them from keeping more than three cats in violation of a Village ordinance. Village of Orion Municipal Code, ch. XII, § 11.0 (amended 2013). The trial court dismissed the complaint and denied the Village leave to file its proposed first amended complaint. The Village appealed. The appellate court reversed and remanded for further proceedings. *Village of Orion v. Hardi*, 2020 IL App (3d) 190095-U. In 2021, the Village filed its second amended complaint. On March 7, 2022, the trial court granted defendants' amended motion to dismiss the second amended complaint, finding that the Village board had previously

voted to permit Hardi to keep more than three cats. The Village appeals. For the following reasons, we reverse and remand for further proceedings.

¶ 2 I. BACKGROUND

¶ 3 At all relevant times, defendants lived together in a residence within the Village. Larson owned a second, combined commercial and rental property within the Village. From 1998 until 2013, Hardi was the Village's animal control officer. In 2013, the Village enacted the ordinance, making it unlawful to keep more than three dogs or cats over the age of six months in any premises within the Village, except in a licensed kennel or at a veterinarian clinic. The ordinance also provided for penalties and injunctive relief for repeated violations.

¶ 4 According to the Village board minutes of April 21, 2014, the following occurred on that date:

> "After much discussion about renewing a kennel license for Ms. Patti Hardi, and with an opinion from Attorney Ames that a state license would first need to be secured, it was moved by Mitton, seconded by Drucker to allow Ms. Hardi to keep her existing dogs and allow them to live out their natural lives with the requirement that as those dogs pass on, the limit allowed by village code be honored and never again exceeded. Ayes: Peterson, O'Leary, Mitton, Newman, and Drucker. Noes: None. Absent: Lawson.
>
> Additionally, the board discussed Ms. Hardi's cats, numbering around 10. Ms. Hardi had the cats prior to the ordinance establishing a limit of three and will be allowed to keep the cats for their natural lifetimes but then be required to abide by [V]illage rules."

¶ 5 On April 14, 2017, the Village served defendants a "Notice to Abate Nuisance." This notice described the nuisance as "keeping and harboring more than three (3) cats" in violation of the ordinance. The notice advised defendants to abate the nuisance on or before May 31, 2017, by "reducing the number of cats you are keeping or harboring to three (3) or less [*sic*]."

¶ 6 On July 18, 2017, the Village filed a two-count complaint against defendants in the circuit court. Count I alleged that defendants failed to abate the nuisance by continuing to keep and harbor more than three cats, and count II sought damages.

¶ 7 On July 24, 2018, defendants filed a motion to dismiss the complaint, alleging the three-cat limit was arbitrary. The motion to dismiss also alleged the ordinance was "superseded" by an order of, presumably, the circuit court of Henry County, entered on August 17, 2016, in case No. 16 CM 160, in which the State charged Hardi with animal cruelty. In the motion to dismiss, defendants alleged that Hardi pleaded guilty in case No. 16 CM 160 and was placed on probation, but she was allowed to keep 10 cats. The court granted the motion to dismiss the complaint, *sua sponte* ruling that the complaint failed to state a claim due to the absence of an allegation that defendants had previously been adjudicated to be in violation of the ordinance. The court denied the Village leave to file its proposed first amended complaint, and the Village appealed. The Third District reversed the trial court's decision and remanded for further proceedings on the ground that the trial court's ruling "finds no support in [the] law." *Village of Orion*, 2020 IL App (3d) 190095-U, ¶ 20.

¶ 8 The court in *Village of Orion* included the following language in its recitation of the facts.

> "In April of 2014, Hardi and Larson *** attended a Village board meeting requesting that their kennel license be renewed. The Board took no action on the

> request to renew the license, instead passing a resolution to allow Hardi to keep her existing dogs for their natural lifetime. While the cats were discussed during the board meeting, no resolution was passed allowing Hardi to keep a number of cats in excess of the ordinance limit." *Village of Orion*, 2020 IL App (3d) 190095-U, ¶ 6.

Justice Holdridge dissented from the court's judgment, reasoning: "Although there was no formal vote ***, the Board's language [in the April 2014 minutes] is unambiguous that Hardi could exceed the ordinance in question for the cats in her possession." *Village of Orion*, 2020 IL App (3d) 190095-U, ¶ 27 (Holdridge, J., dissenting). The dissent opined that the Village board's February 5, 2018, resolution voiding Hardi's permission to exceed the three-cat limit violated the *ex post facto* clauses of the United States and Illinois Constitutions. *Village of Orion*, 2020 IL App (3d) 190095-U, ¶ 30 (Holdridge, J., dissenting).

¶ 9 Upon remand, the Village filed its second amended complaint. Count I was based on the April 14, 2017, "notice to abate nuisance" and alleged an ongoing violation of the ordinance. Specifically pertinent to this appeal, count I alleged that, in a meeting with Village officials in October 2016, defendants were "advised" that the Village board took no action on April 21, 2014, to allow defendants to keep more than three cats. Count II sought damages. Attached to and incorporated into the allegations of the second amended complaint was a Village board resolution dated February 5, 2018, amending the April 21, 2014, board minutes to reflect that "no action had previously been taken in regard to [Hardi's] cats."

¶ 10 On January 6, 2022, defendants filed an amended motion to dismiss the second amended complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2020)). In the amended motion, defendants alleged the ordinance was

"superseded" by (1) the court's order in case No. 16 CM 160 allowing Hardi to keep 10 cats, (2) the April 21, 2014, board minutes allowing Hardi to keep her existing cats, and (3) Larson obtaining a state kennel license in 2019. The Village responded that (1) the State prosecution did not bar the second amended complaint under principles of *res judicata*, (2) on April 21, 2014, the board took no action regarding Hardi's cats, (3) the appellate court in *Village of Orion* rejected defendants' claim that the board allowed Hardi to keep her existing cats, (4) local kennel licensing requirements were not preempted by the State, (5) neither defendant held a local kennel license, and (6) defendants misrepresented to the board on April 21, 2014, that they had only 10 cats. The Village attached excerpts of two deposition transcripts to their response. In one transcript, Larson testified that in 2014 defendants had about 10 cats—"what I considered ours"—at the residence. Larson testified at that deposition that Hardi, in her capacity as Village animal control officer, accumulated an unknown number of cats at Larson's second property. Larson testified he considered those cats to be the Village's property. In the second deposition attached to the Village's response, Hardi testified that she had the same number of cats at the residence in 2014 as those found when authorities searched the residence in 2016. Additionally, the record contains defendants' written admissions that they possessed at least nine cats in October 2017.

¶ 11 On February 8, 2022, the trial court heard evidence on the amended motion to dismiss the second amended complaint. Larson was the first witness. On direct examination, Larson testified that the Village board on April 21, 2014, "grandfathered" defendants' "five dogs and [10] cats" but took no action on their request for a kennel license. Larson testified that he obtained a kennel license from the State in 2019. Larson also testified that Hardi was allowed to keep 10 cats as part of her probation in case No. 16 CM 160, and she successfully completed that

probation. On cross-examination by the Village, Larson testified that he understood the Village board's April 21, 2014, decision to mean that defendants were allowed to keep 10 cats as "part of the deal with the dogs." Larson testified that he kept 10 cats at his residence in April 2014, but he did not know how many cats Hardi kept on his second property as part of her duties as animal control officer. Larson testified that he told the Village board on April 21, 2014, that he had 10 cats because those were the ones he owned, while there were additional cats belonging to the Village that Hardi had taken in as part of her duties as animal control officer.

¶ 12 Next, James Cooper, the Village's mayor, testified that the April 21, 2014, board minutes reflecting that Hardi was allowed to keep her existing cats were in error and were later "corrected" by the February 5, 2018, board resolution. Cooper explained, "We did not approve any extension of keeping cats to their term *** of life." Cooper then agreed that the board minutes of October 6, 2014, stated that the board had "previously voted" to allow Hardi to keep 10 cats. According to Cooper, these board minutes were in error also.

¶ 13 On cross-examination by the Village, Cooper testified that Larson stated at the April 21, 2014, meeting that defendants had five elderly dogs, and the board, "out of goodness," granted a "waiver" for the dogs. According to Cooper, there was no discussion of cats until after the vote on the dogs. Cooper testified that he told Larson at the meeting that keeping 10 cats was "absolutely unacceptable," and Larson then agreed to "get them down" to the three-cat limit. Under questioning by the court, Cooper said he assumed the board approved the minutes of the April 21, 2014, meeting at its next meeting. Cooper also stated it would "probably" be "unusual" for the board to "correct" or "clarify" its minutes four years later. Cooper testified that the February 5, 2018, correction to the April 21, 2014, minutes was made when the board discovered the "error."

¶ 14 Defendants introduced into evidence a portion of the October 6, 2014, board minutes stating: "The Village board had previously voted to allow [Hardi] to maintain the five dogs and ten cats, she earlier claimed to own, until the end of their natural lifespan and then required her to remain in compliance with current regulations of no more than three dogs and three cats."

¶ 15 After the parties' arguments, the court found that, because the Village alleged that the violation occurred in 2017, Larson's 2019 kennel license was irrelevant. The court then ruled that "this case hinges on the effect of the minutes of April 21, 2014, and what the Village did with regard to those minutes subsequent to that." The court found Hardi's request to keep her existing cats was "part of the motion that was voted on and passed" on April 21, 2014. The court then found the October 6, 2014, board minutes "confirmed" the April 21 minutes. The court noted that the October 6 minutes had never been amended. In its written order, the court ruled as follows:

> "The action taken by Plaintiff through the Village of Orion's Board on April 21, 2014, where it allowed Defendants to keep their existing dogs and existing cats numbering around 10 for their natural lifetimes, and subsequent Board action have a clear meaning favorable to the Defendants and negate Plaintiff's right to proceed with an ordinance violation against the Defendants.
>
> It is therefore ordered that Defendants' Amended Motion to Dismiss Plaintiff's Second Amended Complaint is heard and granted and said complaint is dismissed."

¶ 16 This timely appeal followed.

¶ 17 II. ANALYSIS

¶ 18 The Village contends (1) the court's ruling violates the law-of-the-case doctrine, (2) the Village is not estopped from enforcing the ordinance against defendants, (3) the order in case No. 16 CM 160 does not bar the Village's suit against defendants, and (4) the State has not preempted the issue of kennel licenses. (The issue of the kennel license is not before this court, as the trial court found it irrelevant and defendants acquiesced in that ruling.) Defendants concede that the order in case No. 16 CM 160 does not bar the Village's suit.

¶ 19 Preliminarily, we address defendants' request that we affirm the trial court's judgment and then remand "solely to confirm" that the court's dismissal of the second amended complaint was with prejudice. In questioning whether the dismissal was with prejudice, defendants raise an issue concerning our jurisdiction, as "[o]rdinarily, an order dismissing a complaint without prejudice is not deemed final for purposes of appeal." *In re Tiona W.*, 341 Ill. App. 3d 615, 619 (2003).

¶ 20 Defendants' suggestion that we decide the merits of this appeal and then determine whether the court's order was final is not well taken. We stress that the time to address whether an order is final is *before* we consider the merits of the appeal because an appeal lies only from a final order. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); *Irvin v. Poe*, 18 Ill. App. 3d 555, 555-56 (1974) (stating for the reviewing court to have jurisdiction, the order from which the appeal is taken must be a final order terminating the litigation on the merits or disposing of the rights of the parties upon the entire controversy or some definite part thereof) Here, the trial court's written order did not specify whether the dismissal was with or without prejudice. Where a dismissal order does not include either language, we look to the substance of what was decided. *McMann v. Pucinski*, 218 Ill. App. 3d 101, 106 (1991). If the dismissal was due to a deficiency

that could be remedied by a technical amendment, the order is not appealable. *Schal Bovis, Inc. v. Casualty Insurance Co.*, 314 Ill. App. 3d 562, 568 (1999). If, however, the dismissal was due to a substantive legal deficiency, the dismissal order is final. *Schal Bovis*, 314 Ill. App. 3d at 568. Here, the written order found that the Village board's action of April 21, 2014, "negate[s] [the Village's] right to proceed with an ordinance violation against [defendants]." In our view, this order foreclosed the Village from further amending the complaint and is a final order.

¶ 21 We note that the Village filed the notice of appeal after the court announced its oral ruling but before the written order was entered and that the court contemplated that a written order should be entered. Even though the notice of appeal was filed before the written judgment was entered, we have jurisdiction. Illinois Supreme Court Rule 303(a)(1) (eff. July 1, 2017) provides, in pertinent part, that "[a] notice of appeal filed after the court announces a decision, but before the entry of the judgment or order, is treated as filed on the date of and after the entry of the judgment or order."

¶ 22 We turn now to the merits. We determine that the court erred in granting defendants' motion to dismiss the second amended complaint because the section 2-619 motion to dismiss was procedurally improper. Pursuant to section 2-619(a) (735 ILCS 5/2-619(a) (West 2020)), the defendant may move for dismissal upon any of the grounds enumerated therein. At the hearing on the amended motion to dismiss, defendants specified that the order in case No. 16 CM 160 would bar the second amended complaint under section 2-619(a)(4), which provides that "the cause of action is barred by a prior judgment." 735 ILCS 5/2-619(a)(4) (West 2020). Defendants also specified that the board minutes of April 21, 2014, would bar the cause of action under section 2-619(a)(9), which provides that "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-

619(a)(9) (West 2020). Regarding Larson's 2019 kennel license, defendants' counsel stated that, as the court had ruled that matter irrelevant, "I'm not going to even go there." Defendants presented no argument concerning the kennel license to the trial court, and, in this appeal, defendants also concede that the order in case No. 16 CM 160 does not bar the cause of action. This leaves us to consider only the April 21, 2014, board minutes.

¶ 23 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint and all well-pleaded facts and reasonable inferences therefrom and asserts affirmative matter outside the complaint that bars or defeats the cause of action. *Villa DuBois, LLC v. El*, 2020 IL App (1st) 190182, ¶ 34. In ruling on the motion, the court construes the complaint in the light most favorable to the nonmovant and should grant the motion only if the plaintiff can prove no set of facts entitling him or her to recover. *Villa DuBois*, 2020 IL App (1st) 190182, ¶ 34. The purpose of a section 2-619 motion is to provide a method of disposing of issues of law and easily proved facts relating to the affirmative matter early in the litigation. *Villa DuBois*, 2020 IL App (1st) 190182, ¶ 34.

¶ 24 Pursuant to section 2-619(c) (735 ILCS 5/2-619(c) (West 2020)), " '[i]f a material and genuine disputed question of fact is raised[,] the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion.' " *Nosbaum v. Martini*, 312 Ill. App. 3d 108, 114 (2000). We generally review *de novo* the grant or denial of a section 2-619 motion. *Villa DuBois*, 2020 IL App (1st) 190182, ¶ 34. However, if the trial court grants a section 2-619 motion after an evidentiary hearing, the reviewing court reviews both the law and the facts and may reverse the trial court's order where it is incorrect in law or against the manifest weight of the evidence. *Offord v. Fitness International, LLC*, 2015 IL App (1st) 150879, ¶ 15.

¶ 25 We hold that the April 21, 2014, board minutes are insufficient to support the section 2-619(a)(9) motion to dismiss. "[A]ffirmative matter" does not include "evidence upon which [the] defendant expects to contest an ultimate fact stated in the complaint." (Internal quotation marks omitted.) *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 34. As this court stated in *Reynolds*, "affirmative matter is not the defendant's version of the facts as such a basis [for dismissal] merely tends to negate the essential allegations of the plaintiff's cause of action." *Reynolds*, 2013 IL App (4th) 120139, ¶ 34. Consequently, we held that section 2-619(a)(9) does not authorize a defendant to submit affidavits or evidence to contest the plaintiff's allegations and present his or her own "version of the facts." *Reynolds*, 2013 IL App (4th) 120139, ¶ 34. In *Reynolds*, for example, the defendant improperly used section 2-619(a)(9) to contest the plaintiff's factual allegation that one of the defendant's delivery drivers was an employee of the defendant. *Reynolds*, 2013 IL App (4th) 120139, ¶ 46.

¶ 26 Our decision in *Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th) 120207, is also instructive. In *Howle*, the plaintiff sued the defendant for injuries she sustained when she was severely bitten by a dog harbored by the defendant's tenant on the defendant's property. *Howle*, 2012 IL App (4th) 120207, ¶¶ 16, 20. The defendant filed a section 2-619(a)(9) motion to dismiss, arguing that affidavits and deposition testimony showed there was no genuine issue of material fact as to whether the defendant was akin to the dog's owner under the relevant statute. *Howle*, 2012 IL App (4th) 120207, ¶ 32. We held that the defendant's motion addressed an essential allegation of the complaint, ownership of the offending dog, and "amounted to nothing more than [the defendant's] negation of an essential element of [the plaintiff's] complaint." *Howle*, 2012 IL App (4th) 120207, ¶ 32. "[A] claim concerning the negation of a plaintiff's pleadings—that is, a defendant's assertion of 'Not true'—is appropriately resolved either at trial

or in a fact-based motion, such as a motion for summary judgment, not in a motion to dismiss under section 2-619 ***." *Howle*, 2012 IL App (4th) 120207, ¶ 37.

¶ 27 Here, as in *Howle*, defendants' motion to dismiss addressed an essential allegation of the complaint—namely, the board's April 21, 2014, action regarding Hardi's cats. Defendants' "affirmative matter" was the board minutes of April 21, 2014, and Larson's testimony. This evidence merely presented defendants' version of the facts. Then, to refute Larson's testimony, the Village presented Cooper's testimony that the board, on April 21, 2014, did not authorize defendants to keep their cats. The Village also introduced the February 5, 2018, amendment of the April 2014 minutes to refute Larson's testimony and the April 21, 2014, board minutes. To rebut Cooper's testimony, defendants introduced the October 6, 2014, board minutes indicating that the board had previously voted to allow defendants to keep their cats. Thus, the court improperly allowed the parties to conduct a mini-trial on the veracity of the essential allegations of the complaint. See *Reynolds*, 2013 IL App (4th) 120139, ¶ 42 (stating section 2-619(a)(9) does not "authorize a fact-based 'mini-trial' on whether [the] plaintiff can support his allegations"). Here, the court's written order states that the dismissal was granted because the April 21, 2014, board minutes "negate[d]" plaintiff's right to proceed, thus confirming the misuse of section 2-619(a)(9).

¶ 28 As we stated in *Reynolds*, " '[S]ection 2-619 motions should not be used to attack the factual basis of the claim itself.' " *Reynolds*, 2013 IL App (4th) 120139, ¶ 34 (quoting *Barber-Colman Co. v. A&K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1077 (1992)). We reiterate and emphasize what we said in *Reynolds*: a section 2-619(a)(9) motion to dismiss is not "a shortcut to resolve factual issues about the veracity of [the] plaintiff's essential allegations." *Reynolds*, 2013 IL App (4th) 120139, ¶ 53. Accordingly, because defendants' section 2-

619(a)(9) motion did not properly assert affirmative matter, the court's order granting the dismissal is reversed, and this matter is remanded for further proceedings.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we reverse the trial court's judgment and remand for further proceedings.

¶ 31 Reversed and remanded.

Decision Under Review:	Appeal from the Circuit Court of Henry County, No. 17-MR-152; the Hon. Dana R. McReynolds, Judge, presiding.
Attorneys for Appellant:	John G. Ames, of Orion, for appellant.
Attorneys for Appellee:	William Lester Breedlove, of Breedlove Legal, LLC, of Moline, and Larry S. Vandersnick, of Paulson & Vandersnick Law, of Rock Island, for appellees.